International Association of Heat and Frost Insulators and Asbestos Workers, Local 12, AFL–CIO *and* National Surface Cleaning, Inc. and Mason Tenders District Council of Greater New York of the Laborers' International Union of North America, AFL–CIO. Cases 2–CD–816, 2–CD–817, 2–CD–818, 2–CD–819

April 22, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The charges in this Section 10(k) proceeding were filed August 26, 27, and 28 and September 4, 1991, by National Surface Cleaning, Inc., the Employer, alleging that the Respondent, International Association of Heat and Frost Insulators and Asbestos Workers, Local 12, AFL–CIO violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees it represents rather than to Mason Tenders District Council of Greater New York of the Laborers' International Union of North America, AFL–CIO. The hearing was held on September 24 and 26, 1991, before Hearing Officer Terry Morgan.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a New Jersey corporation with an office and place of business in Elmwood Park, New Jersey, is engaged in asbestos abatement and removal in buildings located in the New York metropolitan area. Annually, in the course and conduct of its business, the Employer provides services valued in excess of $50,000 to enterprises with offices and places of business located within the State of New York. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties also stipulated, and we find, that Local 12 and the Mason Tenders are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer's work in the New York metropolitan area consists of asbestos removal in occupied midsize high rise buildings. All the Employer's employees who perform asbestos abatement must be specially trained and licensed by the State of New York and by New York City. Over 90 percent of the abatement work performed by the Employer includes demolition. The asbestos-containing material frequently is located behind barriers which must be demolished in order to gain access to the asbestos-containing material. The Employer's own employees perform this demolition work prior to removing the asbestos-containing material. After the demolition work is completed, the Employer's employees with asbestos and abatement related skills remove all the asbestos from the buildings.

On April 17, 1985, the Laborers' International Union and the International Association of Heat and Frost Insulators and Asbestos Workers entered into an interunion agreement entitled ''International Agreement for Removal of Asbestos-Containing Materials.'' This document states:

> The removal of all insulation materials, whether they contain asbestos or not, from mechanical systems (pipes, boilers, ducts, flues breechings, etc.) is recognized as being the exclusive work of the Asbestos Workers.

The International Agreement also created a three-step procedure for referring disputes or controversies arising out of its application or interpretation. The procedure does not contain a mechanism for resolving disputes that the International presidents fail to settle.

Employees represented by the Mason Tenders have been performing asbestos abatement in New York City since well before the International Agreement. The Mason Tenders has at all times claimed jurisdiction to perform all asbestos abatement work in New York, and it has never recognized the International Agreement in New York.

Consistent with that position, a letter dated April 30, 1991, addressed to the Mason Tenders from the general president of the Laborers' International Union, stated that:

> [O]n October 1, 1986 . . . the Laborers' International Union formally awarded jurisdiction over *all* aspects of asbestos remediation work in the New York Metropolitan area to the Mason Tenders District Council . . . . The award covered the removal of asbestos in all branches of the construction industry, and under all circumstances.
>
> [T]he District Council has implemented this formal award of jurisdiction in collective bargaining agreements, embracing all aspects of this jurisdiction and . . . has organized the vast majority of such work within its territorial jurisdiction. . . . [T]he Council has steadfastly refused at all times to enter into any agreement with the Asbestos Workers Union; or to endorse or accept any such jurisdictional proposal made by any International Union.

> [T]he only governing instrument is the collective bargaining agreement between the Mason Tenders District Council and its employees covering asbestos abatement work.

However, an earlier letter dated July 20, 1989, signed by the general president of the Laborers, addressed to its regional offices and subregional offices, stated that:

> [T]his office has learned that there are some affiliates which are not fully cooperating with the terms and conditions of the Asbestos Abatement Agreement, dated April 17, 1985, between the Laborers' and Asbestos Workers. . . . [T]his office is completely committed to working closely with the Asbestos Workers in accordance with the International Agreement. You must direct all affiliates within your Region to comply with the terms and conditions of the jurisdictional agreement.

The Employer signed a collective-bargaining agreement with the Mason Tenders effective June 1, 1986, to May 1, 1990. This collective-bargaining agreement was subsequently extended until May 31, 1993. Article IV of the Mason Tenders' agreement gives the Mason Tenders exclusive jurisdiction to perform all activities related to asbestos removal work.

On April 20, 1990, the Employer and Asbestos Workers Local 201 entered into a Specialty Agreement for Removal and Abatement of Asbestos. Article IV, section 2(a)(i), of this agreement states as follows:

> The removal of all insulation materials, whether they contain asbestos or not, from mechanical systems (pipes, boilers, ducts, flues, breechings, etc.) is recognized as the exclusive work of the Asbestos Workers.

Appendix ''C'' of the Specialty Agreement consists of the International Agreement described above. In October 1990, the Asbestos Workers International Union allegedly transferred jurisdiction of asbestos removal of mechanical systems from Local 201 to Local 12 in the New York metropolitan area. On October 23, 1990, the Employer allegedly terminated the Local 201 agreement effective December 31, 1990.

During the months of July and August 1991, business agents for Local 12 spoke on several occasions with the Employer's vice president, Kenneth Grandstaff, concerning the use of Local 12 members for the work of asbestos removal from the mechanical systems in the buildings for which the Employer had service contracts in the New York City area. Grandstaff testified that the Employer agreed to assign work to Local 12, only if Local 12 could resolve the jurisdictional dispute with the Mason Tenders and present the Employer with a written agreement between the Unions.

In a telephone conversation on August 23, 1991, a Local 12 representative told the Employer that if Local 12 members were not put to work at the Employer's worksites, Local 12 would picket the Employer's worksites. On the following Monday, Local 12 began to picket the Employer's Sheraton City Squire worksite. This picketing caused the entire worksite to shut down for the day. On the following Tuesday, and continuing through September 20, 1991, Local 12 handbilled at the entrance to each of the Employer's New York City worksites: Sheraton City Squire, Daily News Building, U.S. Postal Service Building, 1114 Sixth Avenue, and 55 Broad Street.

B. *Work in Dispute*

The disputed work consists of the work of asbestos removal and abatement relating to mechanical systems being performed by the Employer in the New York metropolitan area.

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Local 12 violated Section 8(b)(4)(D) of the Act by picketing for the purpose of forcing the assignment of asbestos removal and abatement work to employees represented by Local 12. The Employer also denies that any agreed-upon method to resolve this dispute voluntarily exists. On the merits, the Employer contends that the disputed work should be awarded to employees represented by the Mason Tenders on the basis of employer preference and past practice, economy and efficiency of operations, and the collective-bargaining agreement between the Mason Tenders and the Employer. The Employer further contends that it never had a collective-bargaining agreement with Local 12 and that Local 12's claims are based on an expired collective-bargaining agreement with another Asbestos Workers local, Local 201.

Local 12 contends that it is entitled to the disputed work on the basis of Local 201's collective-bargaining agreement with the Employer and on the International Agreement between the two International Unions. Regarding the collective-bargaining agreement, Local 12 asserts that the ongoing transfer of jurisdiction from Local 201 to Local 12 entitles it to enforce the collective-bargaining agreement. Regarding the International Agreement, Local 12 maintains that the agreement gives its members exclusive jurisdiction over the disputed work. Since the International Agreement is still in force, Local 12 contends that under Board law a local is not permitted to opt out of such an agreement. Cf. *Iron Workers Local 380 (Skoog Construction),* 204 NLRB 353 (1973). Additionally, on the merits, Local 12 contends that the work should be awarded to em-

ployees it represents based on the factors of employee skills, economy and efficiency, and the Employer's preference and past practice. In the alternative, Local 12 contends that an agreed-upon dispute resolution mechanism exists, which binds all parties to the instant dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

Here, Local 12 threatened to picket at the Employer's worksites following its demands that the disputed work be assigned to its members. After the Employer failed to meet Local 12's demands, Local 12 began picketing at the Employer's Sheraton City Squire worksite. Additional picketing and handbilling occurred at the Employer's other New York City worksites. We find on these facts that there is reasonable cause to believe that a purpose of Local 12's picketing and handbilling was to force the Employer to assign the asbestos removal and abatement work to individuals who are represented by Local 12.

Further, we find that the record is insufficient for us to determine whether the alleged transfer of jurisdiction between Locals 201 and 12 actually occurred or that the International Agreement between the two International Unions applies to the New York City area. Thus, we reject Local 12's argument that the language of either the Local 201 collective-bargaining agreement and/or the International Agreement referred to above binds all the parties to a method for resolving the instant dispute.

Based on the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There is no evidence that either of the labor organizations involved in this dispute has been certified by the Board as the collective-bargaining representative of the Employer's employees. The Mason Tenders and the Employer are parties to a collective-bargaining agreement which gives the Mason Tenders exclusive jurisdiction over all the Employer's asbestos removal work in the New York City area.

As noted above, on April 20, 1990, the Employer and Local 201 entered into a ''speciality'' agreement which recognized Local 201 as the exclusive collective-bargaining agent for all its employees who perform duties related to the removal of insulation materials from mechanical systems. In October 1990, the International Association of Heat and Frost Insulators and Asbestos Workers allegedly began the transfer of jurisdiction from Local 201 to Local 12. Local 12 maintains that the International's transfer of jurisdiction allows it to enforce the provisions of the collective-bargaining agreement between Local 201 and the Employer.

At the hearing the Employer introduced into evidence a letter dated October 23, 1990, that was sent by its president to Local 201. The letter stated that on December 31, 1990, the collective-bargaining agreement between the parties would be terminated. However, Local 201 witnesses testified that this termination letter was never received. The Employer also introduced into evidence an April 30, 1991 letter, described above, that was sent by the president of the Laborers' International Union to the Mason Tenders. The letter stated that with regard to jurisdictional disputes relating to asbestos remediation work in the metropolitan area of New York City, the International Agreement had no binding effect on the Mason Tenders. Under these circumstances, we find the factor of collective-bargaining agreements to be inconclusive and does not favor an award of disputed work to either group of employees.

2. Employer preference and past practice

The Employer has assigned the work in dispute to its employees represented by the Mason Tenders. As noted above, at one time the Employer used employees represented by Local 201 and the Mason Tenders to perform asbestos abatement. At some point, the Employer determined that it would use only employees affiliated with the Mason Tenders. The Employer has never used employees represented by Local 12. As for the future, the Employer prefers that its assignment to employees represented by the Mason Tenders be continued. Thus, the factors of employer preference and past practice favor the continued assignment of this

work to the Employer's employees represented by the Mason Tenders.

3. Relative skills

The State and City of New York require the licensing of workers who remove asbestos. The record shows that employees represented by Local 12 (formerly represented by Local 201), Local 201, and the Mason Tenders possess the needed licenses to perform asbestos abatement work.[1] As for specific skills, the record shows that all employees represented by these Unions possess sufficient skills to perform asbestos removal and abatement. Under these circumstances, we find that this factor is inconclusive and does not favor an award of the disputed work to either group of employees.

4. Economy and efficiency of operations

The Employer contends that the use of employees represented by Local 12, in light of Local 12's claiming jurisdiction only over the work of asbestos removal from mechanical systems, would lead to mixed crews of Mason Tenders and Local 12. Grandstaff testified that use of mixed crews would result in disruptions and slowdowns of the Employer's ongoing projects. Grandstaff further testified that the work in dispute would be performed more efficiently with employees represented by only one union at the jobsite. Thus, Grandstaff stated that if asbestos were hidden behind a wall or floor, the demolition work necessary to gain access to this material would be done by employees represented by the Mason Tenders, and not by Local 12's members. Under these circumstances, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Mason Tenders.

[1] At the time of Local 12's picketing, it did not have any members who could perform the disputed work. The record shows that if Local 12 performed the disputed work at that time it would have needed to use Local 201 members.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Mason Tenders are entitled to perform the work in dispute. We reach this conclusion by relying on the Employer's preference, past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Mason Tenders, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of National Surface Cleaning, Inc., represented by Mason Tenders District Council of Greater New York of the Laborers' International Union of North America, AFL–CIO, are entitled to perform the work of asbestos removal and abatement relating to mechanical systems being performed by the Employer in the New York metropolitan area.

2. International Association of Heat and Frost Insulators and Asbestos Workers, Local 12, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force National Surface Cleaning, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Association of Heat and Frost Insulators and Asbestos Workers, Local 12, AFL–CIO shall notify the Regional Director for Region 2 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.